

February 1st, 1745.

ANSWERS for *Hugh Frazer of Lovat, Captain James Ogilvie, John Follie Merchant in Edinburgh, Andrew Willison Doctor of Medicine in Dundee, Mr. William Hogg, George Miller and David Spence, Merchants in Edinburgh;*

To the two PETITIONS of *John Graham of Balgowan*, and others, Creditors of *Sir Patrick Murray of Ouchtertyre*.



Petition having been given in to your Lordships in *February* 1744, at the Instance of *Balgowan*, and other Creditors of *Sir Patrick Murray*, representing, "That *Sir Patrick* had, in *October* 1742, disposed his whole Estate to his Creditors, reserving a certain Part for the Aliment of his Family; but that some of the Creditors had, notwithstanding, gone on in Arrestments, and Processes of Forthcoming; and therefore craving, that your Lordships would sequester the Estates belonging to the common Debtor;" which was ordained to be answered: But the Petitioners did not think fit to move again in this Matter till the 24th instant, that they have given in another Petition, craving, "That your Lordships would renew your Order, appointing the Creditors to answer their former Petition, and that you would sequester the whole Estate belonging to the common Debtor, and appoint Factors for levying the Rents already resting by the Tenants, and in Time coming." And at the Bottom of a printed Copy of this Petition *Sir Patrick Murray* has, on the 26th instant, signed a Consent to the Sequestration demanded.

Your Lordships have ordained both Petitions to be answered; and the Respondents, who are Creditors in above 2000 *l. Sterl.* are sensible they have the greatest Reason to oppose this Demand of a total Sequestration of their Debtor's Estate, as tying up their Hands from every kind of Diligence, whereby they might otherwise recover Payment of their just Debts; and, as far as they are informed, there never was any Precedent of such Sequestration granted by your Lordships in such Circumstances.

The End for which your Lordships grant Sequestrations, is by no means to stop or preclude Creditors from doing Diligence, but to secure the Subject they have affected by their Diligence after it is led. When a Term's Rent, or a Year's Rent, is arrested by several Creditors, and is brought into Court by Multiple-poidings, or other Process, in order to rank the Diligence of the Creditors according to their due Preference, then your Lordships are in Use to sequester the Subject thus brought into Court, lest it should perish in the Tenants Hands, before the Competition is finished: But the Respondents do not know, that your Lordships have, in any Case where the least Opposition was made, sequestered a Subject that was not in Court, in order to prevent Creditors from affecting it by any future Diligence.

And, with great Submission, they cannot discover how such a thing could be done, in any Congruity with the settled Forms of Procedure: It is the Dependence of the Competition in Court that gives your Lordships the Jurisdiction to take the Subject under Competition into the Possession of the Court, until it can be determined how it is to be divided among the several Competitors. The Creditors are all in Court, competing upon that Subject which they have affected, and therefore are obliged to answer to incidental Applications, craving any Order from your Lordships which shall be judged necessary to preserve the Subject in Competition. But because Creditors are competing upon the Rents of one Year which they have arrested, will that oblige them to enter upon a Question with respect to a Sequestration of the Estate in all Time coming, when neither the Estate nor future Rents thereof are affected by their Diligence, or brought into Court by any regular Process? With great Submission, such Demand is entirely irregular, and quite out of Sight of all Form, That your Lordships should take the Possession of a Subject which is not before you, and upon which the Parties are not competing nor have any Right to compete by any Diligence hitherto led.

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It is hardly necessary to cite Authorities in a Case which seems so plain from the Nature of the Thing: But, as far as the Respondents have observed, there is no Foundation, either in our Law Books or in your Lordships Practice, for any other Sequestration than what is above set forth. Lord *Stair*, throughout his Institutes, always supposes, that the Sequestration can go no further than the Subject in Competition: *P.* 685. he says, " In Competitions about Lands or Annualrents, if the Process be dubious and intricate, the Lords, upon Supplication, do sequester the Rents, and do remit the Competitors to an Auditor to determine their Rights and Preferences by a Decreet of Ranking." And again, *p.* 745, " That under Arrestment is comprehended Sequestration, whereby not only is the Subject arrested to remain *in statu quo*, without the Access of either Party contending till their Titles be discussed, but likewise the Custody of the Thing controverted is intrusted to Persons nominate by the Lords, either for the Custody and Management thereof, or Profits of the same to be made forthcoming to the Parties who shall be found to have the best Right." So that still the Sequestration is confined to the Subject which the Parties have affected by their Diligence, and which is to be made forthcoming to them in the Issue of the Competition; and this holds in all Cases, except where your Lordships see Cause to name Factors for managing the Affairs of Infants, or Persons absent, or otherways incapable to act for themselves.

And that the daily Practice of the Court is agreeable to what is above laid down, we may appeal to your Lordships, without enumerating Instances. A late Case occurred, in the Estate of *Roseberry*, which was limited by an Entail, as Sir *Patrick Murray's* is; and the Creditors of the Earl, the Heir of Entail, having gone on in Diligence to secure their Debts, as long as they used no other Diligences but Arrestments of the Rents, your Lordships would grant no Sequestration further than of each Year's Rent, after it had been affected by the Creditors Arrestments, and brought into Court by Competition ensuing thereupon: But how soon the Creditors had adjudged the Right the Earl had to the Estate during his Life, and thereby the Rents of the Estate, in Time coming as well as bygone, were brought into Court as the Subject of their Competition, then your Lordships very properly awarded a Sequestration of the Rents in Time coming, as being then duly affected by the Diligence of the contending Parties.

And, within these few Weeks, as the Respondents are informed, your Lordships were of Opinion, that a Sequestration of the Estate of *Alexander Gartshore* of *Gartshore*, (which is also under an Entail) tho' it was granted at his own Desire, with the Concurrence of some of his Creditors, ought to be recall'd, at the Instance of another Creditor who had not been apprised when it was applied for; and that the Diligence done by the Creditor, tho' after the Lands were sequestered and the Factor named, ought to be effectual.

For, tho' Consent of the Debitor, in such Case, can have no Influence to over-rule the ordinary and regular Course of Procedure, he may give up his own Right, but he cannot, after contracting Debts, tie up the Hands of his Creditors from using such Diligence as the Law affords them, to recover back their Money, or what Part of it can be recovered, out of the Rents of his Estate: With whatever View such Consent is either sought by a Part of the Creditors, or granted by the Debitor, your Lordships will not regard it, when the Tendency is to impede the Diligence of other Creditors. Legal Diligence must be allowed to go on without Restraint; and when thereby the Subject is once affected, your Lordships will take care to preserve it by a Sequestration, until it is brought to a Dividend amongst the Creditors, as they are preferred in the Issue of the Competition.

And therefore we do not chuse to trouble your Lordships with entering into a Detail of the particular Circumstances or Views, which move the Petitioners to apply for this Sequestration, or Sir *Patrick* to consent to it. It were easie to condescend upon the Interest which a good many of these Creditors have, in pursuing of this Measure, wherein, if they shall succeed, they will be in a much better Case than the Respondents. The Respondents have no Method to remedy this Inequality, but by pursuing close the Diligence the Law has afforded them; and they are humbly persuaded, your Lordships will not put a Stop to that Course, at the Suggestion of the Debitor, and a Part of his Creditors, by sequestering Rents, concerning which there is no Competition, for which, it is believed, no Precedent can be alledged.

*In Respect whereof, the Desire of the Petitions ought to be refused.*

JAMES FERGUSON.